IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 29TH JUNE 2007 / 8TH ASHADHA 1929

OP.No. 24448 of 1999(I)

PETITIONER:

LUKOSE THANKACHAN, AGED 58 YEARS,
SON OF LUKOSE, NEDIYAVILA JIMMY MANDIRAM,
PULAMON P.O., 691531, KOTTARAKKARA, KOLLAM DISTRICT.

BY ADV. SRI.M.P.RAMACHANDRAN NAIR (SR.)
SMT.JOHN NELLIMALA SARAI
SRI.DEVAN RAMACHANDRAN

RESPONDENTS:
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1. UNION OF INDIA, REPRESENTED BY SECRETARY,
MINISTRY OF DEFENCE (PENSION APPELLATE COMMITTEE)
NEW DELHI.

2. CONTROLLER OF DEFENCE ACCOUNTS (PENSIONS)
ALLAHABAD.

3. THE OFFICER IN CHARGE, RECORDS,
A.S.C. (SUPPLY), BANGALORE.

BY ADV.SRI.THOMASMATHEW NELLIMOOTTIL,SR.PANEL

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 29/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NOS.41053/99, 6464/00 & 57119/02
IN OP NO.24448 OF 1999 I

//DISMISSED//

29.06.2007. SD/- THOTTATHIL B.RADHAKRISHNAN, JUDGE.

APPENDIX

PETIITONER'S EXHIBITS:

EXT.P1: TRUE COPY OF PROCEEDINGS OF THE MEDICAL BOARD.

EXT.P2: TRUE COPY OF REJECTION LETTER DATED 27.9.1978.

EXT.P2(a): TRUE COPY OF DETAILED REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DT.13.10.1987.

EXT.P3: TRUE COPY OF THE REJECTION LETTER DATED 1.8.1979.

EXT.P4: TRUE COPY OF REJECTION LETTER DATED 12.3.1981.

EXT.P5: TRUE COPY OF THE CERTIFICATE OF POSTING ISSUED BY THE POSTAL DEPT.

EXT.P6: TRUE COPY OF THE REPRESENTATION DT.5.5.99 PENDING BEFORE RESPONDENTS 1 AND 2.

RESPONDENTS' EXHIBITS:

EXT.R1: TRUE COPY OF THE REPORT OF THE MEDICAL BOARD DATED 16.12.77.

EXT.R2: TRUE COPY OF THE INTIMATION ISSUED TO THE PETITIONER DATED 24.3.99.

EXT.R3: TRUE COPY OF THE EXTRACT OF PARA 173 OF PENSION REGULATIONS FOR THE ARMY PART I, 1961 DATD NIL.

/TRUE COPY/

THOTTATHIL B.RADHAKRISHNAN, J.

O.P.No.24448 OF 1999

Dated this the 29th day of June, 2007

JUDGMENT

The petitioner was boarded out of the Indian Army on 31.5.1978 on account of being declared unfit for Army service. By Ext.P1 proceedings of the Medical Board, it was found that he had the disability Neurogenic Amyotrophy. By Ext.P2 dated 27.9.1978, the competent authority rejected the claim of the petitioner for disability pension. Ext.P2(a) appeal filed by the petitioner against that decision was rejected and communicated as per Ext.P3 dated 1.8.1979. He again appealed. That appeal was rejected and communicated as per Ext.P4 dated 12.3.1981.

2. He, thereafter, did nothing, going by the records until 5.5.1999, when he made Ext.P6 addressed to the President of India, in which, he pleaded his case on the basis of a judgment of the Apex Court. It is on the basis of the alleged non-consideration of that representation that this writ petition was filed on 29.9.1999.

3. Counter affidavit is on record. Along with that are the entire documents which show that the petitioner had Neurogenic Amyotrophy and that the Medical Board had concluded that his case is of a disability not connected with service. That view of the Medical Board has necessarily to prevail over the views of any other authority in the department, because, the determination of the question as to whether disability is attributable to or aggravated by military service has to be by the Medical Board and the grant of disability pension will depend on such opinion.

4. Relying on the decision of the Full Bench of this Court in **Baby** v. **Union of India** [2003 (3) KLT 362] and Rule 9 of "Entitlement Rules for Casualty Pensionary Awards, 1982" contained in Appendix II of the Pension Regulation for the Army, 1961, it was argued by the learned counsel for the petitioner that it is the burden of the respondents to prove that the condition on the basis of which the petitioner was found unfit and boarded out is not attributable to Army service. Dilating on this aspect, it

was argued that the petitioner having been recruited after proper medical examination, and because the records clearly establish that he was on duty in extreme weather conditions in Jammu and Kashmir during the relevant time, and no other physiological or other attributes have been made against the petitioner, it has to be prima facie presumed that the disability is not attributable to any constitutional defect, but is attributable only to military service.

5. Per contra, learned counsel for the respondents pointed out that the mere fact that a medical test would have been carried out on the petitioner at the time of his entry in the service is no ground to infer that he would not have had any constitutional defect and therefore, except in exceptional cases, the doctrine of burden of proof, as laid down by the Full Bench in the judgment cited supra, cannot be applied. He further stated that this is a case where the petitioner had slept over his rights for a fairly long period and had been drawing normal pension and as also gainfully employed elsewhere. i.e., in the Kerala

Forest Department with effect from 16.10.1981. He has chosen to agitate the issue after a lapse of 21 years of his discharge by attempting to reopen a closed issue by making a fresh representation in the form of Ext.P6.

6. It is not a matter in dispute that the petitioner is employed in the Kerala Forest Department from 16.10.1981, as noticed above. His re-employment was as an L.D. Clerk. It is not as if he was unaware of the finality attained by the dismissal of his two appeals against the decision of the competent authority refusing disability pension to him. In that context, respondents are justified in contending that the petitioner's attempt in 1999 is only to rake up closed issues which have to be treated as concluded.

7. The Medical Board has categorically stated in Ext.R1 that the situation is not attributable to or aggravated by military service. The situation needs no further explanation through the Medical Board at this distance of time. The question of casting

the burden of proof and adjudicating of that issue does not really arise, having regard to the fact that the last among the appeals by the petitioner stood rejected and communicated to him by order dated 12.3.1981.

For the foregoing reasons, I find no ground to interfere with the impugned decision. No direction is called for. The writ petition fails. The same is dismissed accordingly. No costs.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.

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THOTTATHIL B. RADHAKRISHNAN, J

O.P.NO.24448 OF 1999

JUDGMENT

29TH JUNE, 2007.

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